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No. 71-661

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner's supplemental memorandum calls to the court's attention the Ninth Circuit's recent decision in *United States* v. *Fox*, No. 71-1917, decided December 30, 1971. In that case, as in the present one, an induction order was issued to a registrant without a prior physical examination or statement of acceptability. This was permitted under then-applicable regulations only because the registrant had been declared a delinquent. The panel in *Fox* concluded that the delinquency declaration was infirm under this Court's

decision in *Gutknecht* v. *United States*, 396 U.S. 295, and that therefore the induction order based on it was invalid.

As our memorandum in opposition (pp. 6-7) indicates, we do not think that *Gutknecht* requires this result and thus our position remains that the decision in the present case is correct. While the holdings in *Fox* and in the present case are inconsistent, the conflict is an intra-circuit one, and presumably will be resolved by the Ninth Circuit itself in later cases. Moreover, the issue is not of continuing importance, in view of the fact that the pertinent regulations have now been amended. The new regulations, set forth in the Appendix, *infra*, provide that registrants who, like petitioner, refuse to report for a physical examination may be immediately ordered to report for induction. Such an order no longer rests in any way on a prior delinquency declaration.

For the reasons stated above and in our original memorandum in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

APPENDIX

32 C.F.R. 1631.7(a) and (b):

(a) When a call is received by a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, or for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, the Executive Secretary or clerk, if so authorized, or a local board member shall select, as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I-A or Class I-A-O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction: *Provided*, That notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined: *Provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Whenever the number of postponements of induction materially reduces the number of men the local board actually can deliver in response to a call, the local board shall issue orders to report for induction to such numbers of additional men as may be necessary to meet the call, taking into account the

number of men to be delivered following the expiration of postponements previously granted.

(b) Registrants shall be selected and ordered to report for induction in the following categories and in the order indicated:

(1) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(2) Nonvolunteers in the Extended Priority Selection Group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5.

(3) Nonvolunteers in the First Priority Selection Group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5

(4) Nonvolunteers in each of the lower priority selection groups, in turn, within the group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5

(5) Nonvolunteers who have attained the age of 19 years during the calendar year but who have not attained the age of 20 years, in the order of their dates of birth with the oldest being selected first.

(6) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(7) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

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